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No. 04-1094

Supreme Court, U.S.
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In The
Supreme Court of the United States

CECILIO NUÑEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

NUÑEZ REPLY BRIEF

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QUESTION PRESENTED

The Petitioner disagrees with the issue presented by the government and restates his original question asking whether this Court requires uniform application of *United States v. Booker*, 125 S. Ct. 738 (2005), *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to all cases presently on direct appeal and therefore adhere to that portion of its precedents in *Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004); *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987); and *United States v. Johnson*, 457 U.S. 537 (1982).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PREFACE	1
ARGUMENT	1
I. *Griffith* Should Apply to All Pipeline Cases	4
II. *Sanchez* Foreclosed Nuñez's *Booker* Claim	6
III. The Procedural/Prudential Bar Rule Cannot Override *Griffith*	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Blakely v. Washington, 124 S. Ct. 2531 (2004) ..... *passim*

Desist v. United States, 394 U.S. 244 (1969) 5

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568 (1988) 9

Griffith v. Kentucky, 479 U.S. 314 (1987) ..... *passim*

Johnson v. United States, 520 U.S. 461 (1997) 6, 8

Linkletter v. Walker, 381 U.S. 618 (1965) 5

Mackey v. United States, 401 U.S. 667 (1971) 5, 8

Schriro v. Summerlin, 124 S. Ct. 2519 (2004) 1, 8

Thomas v. Arn, 474 U.S. 140 (1985) 9

United States v. Atkinson, 297 U.S. 157 (1936) 9

United States v. Booker, 125 S. Ct. 738 (2005) ..... *passim*

United States v. Johnson, 457 U.S. 537 (1982) 1, 5

LOWER COURT CASES

Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480 (9th Cir. 1995) 3

United States v. Ameline, 400 F.3d 646 (9th Cir. 2005) 3

United States v. Ardley, 242 F.3d 989, *denying reh'g en banc*, 273 F.3d 991 (11th Cir. 2001) 2, 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Badilla, 383 F.3d 1137 (10th Cir. 2004), *certiorari granted, judgment vacated* by *Badilla v. U.S.*, 125 S. Ct. 1086 (2005) 3

United States v. Cordoza-Estrada, 385 F.3d 56 (1st Cir. 2004) 3

United States v. Crosby, 397 F.3d 103 (2d Cir. 2005) 4

United States v. Curtis, 380 F.3d 1308 (11th Cir. 2004) 4

United States v. Diaz, 248 F.3d 1065 (11th Cir. 2001) 7

United States v. Dockery, 401 F.3d 1261 (11th Cir. 2005) 1, 4, 10

United States v. Garcia, 77 F.3d 274 (9th Cir. 1996) 3

United States v. Gaudin, 515 U.S. 506 (1995) 6

United States v. Harris, 244 F.3d 828 (11th Cir. 2001) 7

United States v. Hembree, 381 F.3d 1109 (11th Cir. 2004) 4

United States v. Levy, 379 F.3d 1241 (11th Cir. 2004) 3, 6, 7, 8

United States v. Levy, 391 F.3d 1327 (11th Cir. 2004), *petition for certiorari filed* (March 1, 2005) (No. 04-8942) 2, 3

United States v. Nealy, 232 F.3d 825 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001) 2, 7, 8, 9

United States v. Oliver, 397 F.3d 369 (6th Cir. 2005) 3

United States v. Paladino, 401 F.3d 471 (7th Cir. 2005) 3

TABLE OF AUTHORITIES – Continued

Page

United States v. Pinargote-Ramirez, 116 Fed. Appx. 246, 2004 WL 1800667 (11th Cir. 2004), *certiorari granted, judgment vacated by Pinargote-Ramirez v. U.S.*, 2005 WL 353619 (U.S.), No. 04-8632 2

United States v. Reese, 382 F.3d 1308 (11th Cir. 2004) 7

United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001) 7, 10

United States v. Washington, 398 F.3d 306 (4th Cir. 2005) 3

RULES

Fed. R. App. P. 28 ..... 4, 9

Fed. R. Crim. P. 52 9

Sup. Ct. R. 15 1

PREFACE

The Solicitor General initially asked this Honorable Court to "vacate the judgment of the Court of Appeals, and remand for further consideration in light of *Booker* and *Fanfan*." *See* Memorandum for the United States, pp. 1-2, March 2005. The government sought permission to file a supplemental brief. That brief reverses its earlier position. Pursuant to the Rules of the Supreme Court, Rule 15, a supplemental brief is restricted to new matters, new cases, or new legislation where such intervening matters were not available at the time of the parties last filing. Here, amongst the sixty some odd cases cited, only one case, *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005) was decided after its March 2005 filing.

ARGUMENT

In its supplemental pleading, the government claims that this Court's retroactivity principles do not take precedence over the Eleventh Circuit's prudential rule of declining to apply new rules of law on direct appeal. *See Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004); *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987); and *United States v. Johnson*, 457 U.S. 537, 545 n. 2 (1982). The Circuit conflict on *Booker/Blakely* remands from this Court as well as the extraordinary limitations in which an appellant can raise such claims in the Eleventh Circuit (compared to all other circuits), amply describes the need for a single rule of law that would allow uniform application to all cases on direct appeal.

This case presents a constitutional *Booker* error. *United States v. Booker*, 125 S. Ct. 738 (2005). The court erred by relying upon judge-found facts to exponentially and mandatorily enhance Nuñez' sentence. As *Booker* makes clear, the Sixth Amendment prohibits this practice. *Booker*, 125 S. Ct. at 756 (2005). The Solicitor General asks that notwithstanding this constitutional violation, the Eleventh Circuit should not review this case. However, in its remedial holding this Court outlined how its decision was to be applied and notes, "[W]e must apply today's

holding – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." *Booker*, 125 S. Ct. at 769. As a result, it is clear that notwithstanding the Solicitor General's protestations and Eleventh Circuit practice, *Booker* must be applied retroactively to cases, such as Nuñez, that were pending on direct review at the time of Booker's issuance. Secondly, Nuñez' case involves a Sixth Amendment sentencing violation. Third, review must occur at least under the plain error test because this does involve a constitutional violation where a sentence was unconstitutionally imposed in an unconstitutional manner with exponentially more severe result than permitted by law.

The prosecution primarily relies upon *United States v. Ardley*, 242 F.3d 989, 990, *denying reh'g en banc*, 273 F.3d 991, 992 (11th Cir.), (Carnes, J., concurring in denial of *reh'g en banc*), *cert. denied*, 533 U.S. 962 (2001) (but *see Ardley*, 273 F.3d at 992, Tjoflat, J., dissenting from the denial of rehearing *en banc*); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), *cert. denied*, 534 U.S. 1023 (2001); and *United States v. Levy*, 391 F.3d 1327, 1340 (11th Cir. 2004), *petition for certiorari filed* (March 1, 2005) (No. 04-8942)[1] (but *see* Tjoflat, J., dissenting from the denial of rehearing *en banc*).

The Tjoflat dissent in *Ardley/Levy* criticizes fellow circuit judges for a patently unfair procedural rule violative of *Griffith* that obscures the intent of the Supreme Court in treating similarly situated defendants in a similar manner because of its overriding fear of "do-overs."

> But when the Supreme Court decided *Griffith*, it was well aware that extending retroactivity to all cases pending on direct review. . . . As a court of

[1] The Petitioner respectfully incorporates by reference those same arguments here, all of which suggest mandatory procedural default rules should not contravene the retroactivity principles of *Griffith v. Kentucky*. *See also*, *U.S. v. Pinargote-Ramirez*, 116 Fed. Appx. 246, 2004 WL 1800667 (11th Cir. 2004), *certiorari granted, judgment vacated by Pinargote-Ramirez v. U.S.*, 2005 WL 353619 (U.S.), No. 04-8632.

> appeals, we cannot now reevaluate such considerations on a case-by-case basis – *Griffith* made this decision for us.

United States v. Levy, 391 F.3d at 1341 (Tjoflat, J. dissenting). In this context it is particularly instructive to review the plethora of cases cited by Former Chief Judge Tjoflat showing that the Eleventh Circuit stands alone on its refusal to apply *Apprendi/Blakely/Booker* to pipeline cases. *See Levy*, 391 F.3d at 1345-47, n. 15-16.[2]

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[2] Beyond the scores of cases cited by Judge Tjoflat, *see also U.S. v. Washington*, 398 F.3d 306, 312, n. 7 (4th Cir. 2005) ("Although appellate contentions not raised in an opening brief are normally deemed to have been waived . . . the *Booker* principles apply in this proceeding because the Court specifically mandated that we "must apply [*Booker*] . . . to all cases on direct review." Breyer Opinion at 25."); *U.S. v. Oliver*, 397 F.3d 369, 377, n. 1. (6th Cir. 2005) ("Oliver's brief did not initially raise the claim that his sentence violated the Sixth Amendment as the brief was submitted prior to the Supreme Court's ruling in either *Blakely v. Washington* . . . or *U.S. v. Booker*, 125 S. Ct. 738 (2005). . . . Oliver submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) advising us that *Blakely* constituted a supplemental authority pertaining to Oliver's sentencing challenge. . . . We agree with the First Circuit's determination in *U.S. v. Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004) that: "Since Appellant's argument depends upon a decision that did not exist at the time of briefing, a 28(j) letter is a perfectly appropriate avenue by which to present it." *Id.* at 59.); *U.S. v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005) ("[W]e cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence," collecting cases on circuit conflict over application of plain error review to *Booker* errors; strongly disagreeing with Eleventh Circuit's position); *U.S. v. Badilla*, 383 F.3d 1137 (10th Cir. 2004) (*Blakely* raised in Rule 28 letter), *certiorari granted, judgment vacated* by *Badilla v. U.S.* 125 S. Ct. 1086 (2005); *U.S. v. Ameline*, 400 F.3d 646, 652 (9th Cir. 2005) ("Our precedent provides ample support for our authority to consider *sua sponte* a claim that was not initially raised on appeal. We previously have "examine[d] *sua sponte* the application of [a] recent Supreme Court opinion" to a defendant's conviction. *U.S. v. Garcia*, 77 F.3d 274, 276 (9th Cir. 1996); *see also Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995) (holding that "[w]e will review an issue that has been raised for the first time on appeal under certain narrow circumstances," including "when a change in law raises a new issue while an appeal is pending"); *U.S. v. Paladino*, 401 F.3d 471, 483-484 (7th Cir. 2005)

(Continued on following page)

I. *Griffith* Should Apply to All Pipeline Cases.

The Supreme Court announced new Sixth Amendment rights in *Blakely* and *Booker*. *Blakely* and *Booker* predominantly impact those cases in which the Defendant does not waive his Sixth Amendment right, and instead, like here, proceeds to trial by a jury as guaranteed by the constitution. In those cases, which constitute a very small fraction of the total number of criminal cases in the federal system, it is eminently important to protect a Defendant's *Blakely/Booker* rights under the Sixth Amendment, particularly when the matter is still on direct appeal.[3]

("whether the kind of plain error argued in these cases has actually occurred is to ask the district judge. We agree . . . with the Second Circuit's ruling in *U.S. v. Crosby*, 397 F.3d 103, 117 (2d Cir. 2005), that what an appellate court should do in *Booker* cases . . . while retaining jurisdiction of the appeal, order a limited remand to permit the sentencing judge to determine whether he would (if required to resentence) reimpose his original sentence . . . *See also U.S. v. Williams*, 399 F.3d 450 (2d Cir. 2005)"). The Eleventh Circuit's practice is merely a local rule and as such conflicts with Fed. R. App. P. 28(j) itself because it effectively uses its construction of that rule to place restrictions on *Griffith*. Compare, *U.S. v. Hembree*, 381 F.3d 1109 (11th Cir. 2004) (Defendant's motion for leave to file a substitute principal brief for purpose of raising claim of *Blakely* error construed as motion to file supplemental, denied based upon rule forbidding parties from raising new issues by supplemental briefs.); *U.S. v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004) ("This rule does not apply differently in a case, such as this, where the motion is to file a supplemental brief raising an issue for the first time *prior to* a decision on the merits of the direct appeal. We have so held in the context of an *Apprendi*-based claim raised for the first time in supplemental briefing prior to the decision on the merits."); *U.S. v. Dockery*, 401 F.3d 1261 (11th Cir. 2005) (Remand by Supreme Court to reconsider case in light of *Booker* did not require Court of Appeals to treat case as though constitutional challenge to sentence had been timely raised before it, and thus did not preclude Court of Appeals from considering issue to have been abandoned.)

[3] According to the United States Sentencing Commission, "2002 Source Book of Federal Sentencing Statistics." 97.1 of all criminal cases were resolved without jury trial and with a waiver of his or her Sixth Amendment rights.

Now, notwithstanding the eloquent statements of this Court "to resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, *Mackey v. United States*, 401 U.S. 667, 679 (1971) (separate opinion of Harlan, J.) and "to do justice to each litigant on the merits of his own case," *Desist v. United States*, 394 U.S. 244, 259 (1969) (Harlan, J, dissenting), the government argues that the new constitutional rule announced in *Booker* and *Blakely* should not apply to Nuñez.

The Eleventh Circuit's internal rules for how and whether an issue can be raised on appeal cannot override the concerns about fundamental fairness and the integrity of judicial review that this Court identifies in *Griffith*. If the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," 479 U.S. at 322, that failure violates constitutional norms as much in the case of a defendant who failed to raise a new rule of criminal procedure that was not available when he filed his initial appellate brief as it would in the case of a defendant who did anticipate the new rule.

There is no basis in *Griffith* or elsewhere to conclude that the decision applies only to defendants who have preserved their constitutional challenges, whether during trial, throughout direct review, or both. The *Griffith* Court granted *certiorari* to answer the question "whether the ruling in *Batson* applies retroactively to a state conviction pending on direct review at the time of the *Batson* decision." *Griffith*, 479 U.S. at 318. *Griffith* neither posed nor answered the more limited question of whether *Batson* applies retroactively only to a defendant who has preserved his objection to a prosecutor's peremptory challenges. Rather, summarizing its prior case law, the Court observed that in a number of separate opinions since *Linkletter v. Walker*, 381 U.S. 618, 622, n. 5 (1965) various Members of the Court have asserted that, at a minimum, *all defendants whose cases were still pending on direct appeal* at the time of the law-changing decision should be entitled to invoke the new rule. *Griffith*, 479 U.S. at 322 (quoting *United States v. Johnson*, 457 U.S.

537, 545 and n. 9 (1982) (Harlan, J.) (internal quotations omitted) (emphasis added)). The Court distinguished not between defendants who preserved their *Batson* objections and those who failed to, but rather between "cases that have become final and those that have not." *Griffith*, 479 U.S. at 322. The *Griffith* Court went on to hold that " . . . the integrity of judicial review requires that we apply that rule to *all similar cases pending on direct review.*" *Id.* at 322-23 (emphasis added). It is particularly enlightening to review the Eleventh Circuit's extraordinarily myopic perspective of how to treat Supreme Court landscape changing decisions with similar opinions from the other circuits. *See* n. 1, *supra*.

II. *Sanchez* Foreclosed Nuñez's *Booker* Claim.

Petitioner recognizes the issue of waiver and abandonment. These concepts should not apply here. Because the uniform precedent of the Courts of Appeals precluded application of *Apprendi* to the Federal Sentencing Guidelines, there was no waiver or abandonment of a cognizable error. Neither Defendant nor counsel should raise meritless issues in light of current precedent simply to prospectively preserve the claim. *See Johnson v. United States*, 520 U.S. 461, 478 (1997);[4] *United States v. Levy*, 391 F.3d at 1356 (Tjoflat dissenting) ("it seems that the Supreme Court has rejected the reasoning that underlies the panel's position and found that it is neither just nor efficient to expect a defendant to raise objections even where "near-uniform precedent" of the Supreme Court and the Courts of Appeals forecloses those objections. As noted earlier, prior to *Blakely*, this and every other circuit court in the nation had held that *Apprendi* does not apply to the Federal Guidelines.").

Should appellate counsel file a brief and claim on anything that passes the "laugh test" regardless of whether it has been squarely foreclosed by precedent?

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[4] The prosecution's supplemental brief recognizes that *Johnson* requires the rule of *U.S. v. Gaudin*, 515 U.S. 506 (1995), to apply retroactively but subject to review only for plain error. Supplemental Brief, p. 8, n. 2.

Does it matter that the Eleventh Circuit, along with every other appellate court in the nation, held that *Apprendi* did not apply to the Federal Sentencing Guidelines. *See United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001) ("*Apprendi* does not apply to judge-made determinations pursuant to the Sentencing Guidelines"); *United States v. Nealy*, 232 F.3d 825, 829 n. 3 (11th Cir. 2000) ("The Sentencing Guidelines are not subject to the *Apprendi* rule."); *United States v. Harris*, 244 F.3d 828, 829-30 (11th Cir. 2001) (holding that *Apprendi* does not apply to the relevant conduct provision of the Sentencing Guidelines); and *United States v. Diaz*, 248 F.3d 1065, 1105 (11th Cir. 2001) (noting that "Sentencing Guideline issues are not subject to the *Apprendi* rule and, thus, there is no requirement that sentencing facts be submitted to a jury and found beyond a reasonable doubt"). Accordingly, how can the Solicitor General fairly argue that Nuñez "waived" or "abandoned" an issue that was already decided?[5]

If Nuñez could not have fairly raised *Apprendi* in his initial appellate brief, in accordance with governing case law, why should he not be able to do so after this Court addressed the issue while still on direct review? *See Blakely*, 124 S. Ct. at 2548-49, 2562.[6] (Justices O'Connor and Breyer in their dissent, emphasize the dramatic novelty of the decision and its potential to reshape the nation's criminal law system.)

By requiring defendants to raise foreclosed issues over and over again, no matter how unambiguously the Circuit has already decided those issues, *Levy* gives criminal defendants an incentive to flood the federal courts with countless claims that are clearly foreclosed by current precedent, just as Levy's *Apprendi* claim was clearly foreclosed by *Sanchez*. The district and circuit courts (and

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[5] The unanimous agreement of the circuits on this point is documented in Justice O'Connor's dissenting opinion in *Blakely*. *See Blakely v. Washington*, 124 S. Ct. 2531 n. 1 (2004).

[6] The Eleventh Circuit in *U.S. v. Reese*, 382 F.3d 1308 (11th Cir. 2004), ruled that *Blakely* does not apply to the Federal Guidelines.

this Court) will then be forced to address those claims over and over again. This is not a very effective way of conserving scarce judicial resources.

Moreover, the Supreme Court has rejected – albeit in a different context (that of plain error) – the Eleventh Circuit's view that defendants should be forced to raise objections that are clearly without merit in light of current precedent, simply in order to be able to preserve their claims on appeal. *Johnson*, 520 U.S. at 467-68. Thus, it seems that the Supreme Court has rejected the reasoning that underlies *Levy's* position finding it is neither just nor efficient to expect a defendant to raise objections even where "near-uniform precedent" of the Supreme Court and the Courts of Appeals foreclose those objections.

III. The Procedural/Prudential Bar Rule Cannot Override *Griffith*.

Booker involves a new rule of criminal procedure that the Supreme Court announced *after* the Defendant filed his initial appellate brief. Contrary to all other circuits, the Eleventh Circuit concludes that even supplemental briefs can be authorized "only when intervening decisions or new developments arise after the moving party's brief has been filed *and only when that new authority relates to an issue or issues already properly raised in the party's initial brief.*" *United States v. Levy*, 379 F.3d 1241, 1243 (11th Cir. 2004) (summarizing *Nealy*, 232 F.3d at 830) (emphasis added).[7]

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[7] The prosecution claims, without merit, the Eleventh Circuit's "default" rule does not conflict with other circuits. The suggestion there should not be uniform application of *Booker/Blakely* remands does violence to *Griffith v. Kentucky* as well as *Booker*, itself. The suggestion that intervening decisions of this Court of such momentous nature as *Booker* and *Blakely* should be ignored in the direct review process by local rule would require this Court to ignore the substance of the new federal sentencing landscape as well as thirty-five years of its precedent from *Mackey v. U.S.* through *Schriro v. Summerlin*. *See* n. 1, *supra* and *Levy*, 391 F.3d at 1345-47, n. 15-16.

The Eleventh Circuit's prudential bar rule of *Nealy/Ardley/Levy,* is subject to countervailing legal and institutional norms. The Eleventh Circuit's issue-abandonment rule – a rule that effectively overrides Fed. R. Crim. P. 52(b)'s plain error rule by barring any review of issues not included in the initial brief – cannot be sustained in light of this Court's prior decisions.[8] Similarly, reliance upon Fed. R. App. P. 28(a)(5) would raise a serious constitutional problem, since it would conflict with the absolute rule of retroactivity that the Supreme Court announced in *Griffith.* To avoid a constitutional conflict with *Griffith*, Fed. R. App. P. 28(a)(5) should be read to exclude issues ***that are raised by a new rule of criminal procedure announced after a defendant has filed his initial appellate brief.*** *See, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

Comparable issues were debated in *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001), *Ardley* applied the procedural bar rule to an *Apprendi* claim even after the Supreme Court remanded with instructions to reconsider a prior panel opinion in light of *Apprendi.* But the defendant in *Ardley* had available to him at the time of his initial brief a "general argument" that was subsequently

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[8] *See U.S. v. Atkinson*, 297 U.S. 157 (1936) (holding that plain error doctrine applies to issues not raised on appeal); *Thomas v. Arn*, 474 U.S. 140, 148 (1985) (court of appeals' rules of practice may not contravene federal rules or restrict statutorily-mandated jurisdiction; "Even a sensible and efficient use of the supervisory power, however, is **invalid** if it conflicts with constitutional or statutory provisions. A contrary result would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing."; "We need not decide at this time what standards the courts of appeals must apply in considering exceptions to their waiver rules.") (emphasis added) (internal quotation omitted).

elevated into a new rule of criminal procedure by the Supreme Court. As already noted, at the time of his initial brief Nuñez had no such "general argument" available to him because the Eleventh Circuit's decision in *Sanchez* had taken away his ability to invoke *Apprendi* to challenge the application of the Federal Sentencing Guidelines.

CONCLUSION

The writ application requests, "remand to the United States Court of Appeals for the Eleventh Circuit ***with instructions that resentencing be ordered consistent with United States v. Booker***. . . ." Petition for Writ of *Certiorari*, p. 24. (Bold and italics added).

The Eleventh Circuit makes the futility of generic GVR orders clear, having held, post-*Booker*, that it will not retreat from its issue-waiver rule even upon remand "for further consideration in light of *Booker*." *United States v. Dockery*, 401 F.3d 1261, 1262 (11th Cir. 2005). Therefore, specific direction is required in the GVR. Otherwise, a GVR order will precipitate a second round of certiorari petitions in this and like cases in the Eleventh Circuit. Nuñez respectfully invites the following ruling as an alternative,

> The petition for writ of certiorari to the Eleventh Circuit is granted. The case is remanded to the Eleventh Circuit to conduct plain error review of the legality of petitioner's sentence in light of *United States v. Booker*, 125 S. Ct. 738 (2005).

Respectfully submitted,

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